EXHIBIT 82

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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M.G. et al,

Plaintiff,

-against-

ANDREW CUOMO, et al,

Defendants.

7:19-cv-00639-CS-LMS
BENCH RULING
VIA TELECONFERENCE

----------x

United States Courthouse
White Plains, New York

September 25, 2020

B e f o r e:

HONORABLE JUDGE CATHY SEIBEL,
United States District Judge

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PROCEEDINGS

THE DEPUTY CLERK: M.G. et al v. Cuomo, et al.

THE COURT: All right. Good afternoon, everyone.

I apologize for keeping you waiting. I just extricated myself from a Zoom meeting.

Let me remind counsel if you're going to say anything, the first word out of your mouth must be your last name. Please don't say "This is Elena Landriscina for Plaintiff." Just say "Landriscina." Don't worry about sounding brusque or impolite. We have a court reporter and it's very important that she knows right up front who is speaking. In fact, if you don't start by saying your last name, she'll probably interrupt you and what you say will be lost. So please, it doesn't come naturally, I know, but please try to do that.

I have spent quality time with the motion papers. I'm going to ask a question. If you don't ask have an answer, just stay silent. If you do, say your last name and pipe up.

Does anybody have anything to add that's not covered by the motion papers? Okay.

Let me tell you where I come out and also I want to put on the record before we start, one of the lawyers on the Plaintiffs' team who is a former law clerk of mine is getting married imminently and I will be performing the ceremony. I just wanted everybody to be aware of that.

The motion before me is Defendants' motion to dismiss the first amended class action complaint, which I'm going to call the FAC.

Because this case has been the subject of lots of briefing and argument and lots of paper, I'm -- rather than taking time to summarize what's in the FAC, I'm going to assume the parties' familiarity with factual record. In summary fashion, Plaintiffs are individuals with serious mental illness who are indigents. They originally brought this lawsuit to challenge their institutionalization in New York's prison system.

The defendants includes Governor Andrew Cuomo in his official capacity; the New York State Office of Mental Health, or OMH; Commissioner Ann Marie Sullivan in her official capacity; the Department of Corrections and Community Supervision, or DOCCS; Commissioner Anthony Annucci in his official capacity, actually acting commissioner; and Ann Marie McGrath in her official capacity as DOCCS. Plaintiffs allege that defendants held them in prison past their lawful release dates due to their failure to make available the community-based housing and supportive services Plaintiffs require upon relief.

Plaintiffs purport to represent two classes. A general class of people with serious mental illness who defendants hold in secure prisons past their release dates,

including the end of their prison sentences, their approved conditional release dates and their open dates for parole release due to the inadequate capacity of community-based mental health housing programs. And a second class called the RTF Subclass. "RTF" stands for Residential Treatment Facility. The RTF Subclass is general class members who have been incarcerated past the maximum expiration dates of their court-imposed prison sentences. Plaintiffs allege that the RTFs where they are held are prisons where they are treated just like prisoners.

The plaintiffs filed their original complaint on January 23, 2019. We had a conference in May. I gave Plaintiffs leave to amend. They filed the FAC on June 3rd. On August 2nd of last year I referred the case to Magistrate Judge Smith for general pretrial supervision. The parties bundled their motion papers, so the defendants filed this motion, which is Docket Entry 79. Their supporting memorandum of law, which is Docket Entry 80, which I'm going to call defendant's memo, as well their reply memorandum, Docket Entry 90, which I'm going to call Defendants' Reply, at the same time as Plaintiffs filed their opposition, Docket Entry 82, which I'm going to call Plaintiffs' memo. And that was all on December 16.

Both parties also filed attorney declarations attaching various documents. And the named Plaintiffs also filed sworn declarations which are found at Docket Entries 81,

83 through 89, 114, 115, 117 and 121. Defendants filed sworn declarations from OMH and DOCCS's staff at Docket Entry 91 and 92. And both parties filed sur-replies in March of this year. Plaintiffs' sur-reply is 113 and Defendants is 120.

Then on August 10 of this year, Plaintiffs requested a pre-motion conference with Judge Smith in anticipation of amending the FAC, principally to add a "Discharge Class" of Plaintiffs who are unnecessarily placed in segregated settings or put at risk of institutionalization upon their discharge from prison.

In their letter, which is Docket Entry 125, Plaintiff explained that, quote, the proposed amendment would not impact the Court's resolution of the pending motion to dismiss, unquote. That's at page 2. After a conference, Judge Smith issued an opinion and order, which is Docket Entry 133, and allowed Plaintiffs to file the Second Amended Complaint, or SAC, which is Docket Entry 134.

She noted in her decision at page 10, as follows: Quote, Contrary to Plaintiffs' assertions, the new claims do appear to change the tenor of the case. For example, the addition of the proposed named Plaintiffs as the Discharge Class expands the focus of the dispute from persons being held in prison past their release dates due to their severe mental illness to persons with severe mental illness denied community-based housing in the most integrated setting

appropriate to their needs and/or who face a substantial risk of institutionalization.

Judge Smith also explained, based on her reading of the SAC, that Plaintiffs also add facts to the pleadings which do not specifically relate to the Discharge Class or which include allegations about the previously named Plaintiffs under sections nominally related to the Discharge Class which may affect the Court's decision on Defendants' motion to dismiss. That's also at page 10.

Accordingly, while this motion has been pending for some time, I have to examine whether it would still be appropriate for me to rule on the arguments the parties have briefed or if those arguments are affected by the SAC in such a way that they require more briefing and are better reserved for a future motion to dismiss or for summary judgment. So I'll touch on that as we go along.

But let me tell you where I come out. I assume you're all going to be ordering the transcript. If you're not, you'll want to take detailed notes and do make yourself comfortable because this is going to take a while.

The first I'm going to address is Subject Matter Jurisdiction: I have subject matter jurisdiction over cause of action only when I have authority to adjudicate the cause pressed in the complaint. *Arar v. Ashcroft*, 532 F.3d 157, 168. Reversed en banc on other grounds, 585 F.3d 559.

Quote, Determining the existence of subject matter jurisdiction is a threshold inquiry, and a claim properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when district courts lacks the statutory or constitutional power to adjudicate it, unquote, RR at 168.

That case goes on to say, quote, When jurisdiction is challenged, the Plaintiff bears the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists and the district court may examine evidence outside of the pleadings to make this determination.

Quote, the Court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of Plaintiff, but jurisdiction must be shown affirmatively and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it, unquote. *Morrison v. National Australian Bank*, 547 F.3d, 160, 170. Affirmed on other grounds, 561 U.S. 247.

When a Defendant moves to dismiss both for lack of subject matter jurisdiction and on other grounds such as failure to state a claim, the Court must address the issue of subject matter jurisdiction first. See *Rhulen Agency v. Alabama Insurance*, 896 F.2d 674, 678. I won't take the time to recite the standards applicable to a motion to dismiss for failure to state the claim. Everybody is familiar with the standards of *Iqbal*, 556 U.S. 662 and *Twombly* 550 U.S. 544.

Where matters outside the pleading are presented on a 12(b)(6) motion and not excluded, the motion must be treated as one for summary judgment under Rule 56. See Rule 12(d). The requirement of conversion is mandatory and unless the additional materials are excluded, the portion of the Defendants' motion that relies on those materials in connection with Rule 12(b)(6) must be treated as a summary judgment motion. *Global Network v. City of New York*, 458 F.3d 150, 155. The Court, obviously, only grants summary judgment when resolving all ambiguities and join all permissible factual inferences in favor of the party against whom summary judgment is sought. The moving party shows no genuine dispute as material fact -- as to any material fact and that the moving party is entitled to judgment as a matter of law. See Rule 56(a) in *Holcomb v. Iona College*, 521 F.3d 130, 137. So those are the general legal standards.

I turn first to the issue of Governor Cuomo as Defendant: Federal courts are permitted under *Ex parte Young*, 209 U.S. 123, to grant prospective injunctive relief against state officials "to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68. See *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635, 645 to 48.

For a specific state official to be a proper Defendant for injunctive relief under the *Ex parte Young*

doctrine, the state official, quote, must have some connection with the enforcement of the act, unquote. *In re Dairy Mart Convenience Stores*, 411 F.3d 367, 372 to 373. Plaintiffs oversimplify the standard by stating that all *Ex parte Young* requires is, quote, some connection, unquote, between the governor and the violation of federal law. That's in Plaintiffs' memo at 22 to 23. By omitting the phrase, quote, with the enforcement, unquote, they propose a significantly broader and more tenuous connection than set forth in *Dairy Mart*. The quote, official against whom the action is brought must have a direct connection to or responsibility for the alleged action, unquote. *Davidson v. Scully*, 148 F. Supp.2d 249, 254, (S.D.N.Y. 2001). See *CSX v. New York State*, 306 F.3d 87, 99 and *Jackson v. Connecticut*, 2019 Westlaw 2193464, at page 4, (District of Connecticut May 21, 2019.)

Let me ask everybody to put themselves on mute, because I'm getting a lot of background and beeping and things like that. And I think if it's distracting me, it's probably distracting the court reporter.

So as I said, I'm going to be talking for a long time, so if everybody else could please mute. Continuing on now.

A mere recitation of an official's responsibilities -- does anybody know what that beeping is? All right. Let me go on.

That is really distracting. Walter, do you know what that is?

MR. RICCIARDI: I have no idea.

THE COURT: I'm talking to Walter Clark. Maybe he's left us. One hundred percent of the people on this call have to be on mute. If anybody doesn't know how to mute -- hold on, let me find out.

Maybe my law clerk knows. Ryan, do you know?

THE LAW CLERK: No, I'm not sure. Walter usually has it pulled up on his computer where he can mute everybody.

THE COURT: Hold on one second. I'm going to walk in there and see if I can get him to mute it. Hold on.

He's stepped out. I think he'll be able to mute everybody. But hopefully the beeping has stopped. When he comes back, my other law clerk will let him know.

Somebody is not muted right now because I can hear noise. I wish I knew how to tell you how to mute. Maybe somebody who is successfully can unmute. Ryan, my law clerk, how did you mute yourself?

THE LAW CLERK: I'm on my cell phone. Just a button that says "mute."

THE COURT: So you did it on your phone. You didn't do it through this AT&T system like star seven or something like that?

THE LAW CLERK: Right.

THE COURT: All right. I know there's way to do it, but I don't know what it is.

All right. I'm going to press on and it's going to be -- that beeping is so annoying. Okay. I'm pressing on.

Okay. Whoever is in the car, we really don't want to listen to Waze or Google Maps or whatever that is. You should be able to mute the call via your cell phone. Okay.

A mere recitation of an official's responsibilities to safely execute the law is an insufficient basis to permit a suit to go forward against that official because, quote, the proper Defendants are the government officials charged with the administration and enforcement, unquote, of the purported illegal conduct. *Curtis v Pataki*, 1997 Westlaw 614285 at page 6 (Northern District October 1, 1997); See *Pugh v. Goord*, 571 F. Supp.2d 477, 517 to 18 (S.D.N.Y. 2008).

When the governor of a state is named as a Defendant, district courts in this circuit have often found an insufficient enforcement connection between the governor and the complained-of conduct, and that other state officials are more appropriate Defendants. See *Disability Rights New York v. New York State*, 2019 Westlaw 2497907 at pages 23 to 24, (Eastern District June 14, 2019).

Governors are usually dismissed as a Defendant when they lack direct involvement in the enforcement of the alleged illegal conduct. See, for example, *Spiteri v. Russo*, 2013

Westlaw 4806960 at page 18, (Eastern District September 7, 2013), affirmed 622 F. App. 9. There the governor had no direct involvement in Plaintiffs' classification as a sex offender. Also see *Nolan v. Cuomo*, 2013 Westlaw 168674 at page 9, (Eastern District January 16, 2013), which held that the governor's duty to ensure that the law is enforced is not sufficient to make him a proper party, and *Curtis* at page 6, where in a suit against the DOCCS commissioner and the governor, only the DOCCS commissioner was a proper Defendant.

By failing to show how Governor Cuomo has a connection to the enforcement of the challenged conduct at issue here, Plaintiffs have fallen short of what the law requires. They argue that they have alleged sufficient, quote, active involvement, unquote, by the governor to withstand a motion to dismiss by describing his efforts to, quote, address the putative class's community-based housing needs, unquote. That's in their memo at 23. While Plaintiffs are correct, as they say at that same page, that they need not show that the governor was involved in the minutiae of Plaintiffs' discharge plans, they recite only responsibilities attributed to the Governor in the general discharge of his office, such as appointing the leadership of and receiving reports from certain agencies, commissions and cabinets that address issues implicated in this case. See the FAC in paragraph 179 to 87.

Plaintiffs fail to allege that the governor had a

direct enforcement role of any kind in any of the conduct that forms the basis for their lawsuit. While Plaintiffs argue that access to the state's capital budget is necessary for full relief in this case, that is not necessarily so. And in any event, Governor Cuomo shares the responsibility for allocating funds with the assembly and the senate. If this Court were to grant injunctive relief directed at DOCCS and OMH, their compliance would not be excused based on budgetary reasons. So Plaintiffs have not shown that the governor is necessary for full relief, even if it might be he who needs to take the bull by the horns to allocate responsibility among the two agencies if this case is to settle.

Plaintiffs rely on out-of-circuit district court cases that are not persuasive here, especially because one in-circuit case they do cite, *Nassau & Suffolk County Taxi Owners Association v. State*, 336 F.Supp. 3d 50 at 68, 69, (Eastern District 2018), dismissed the governor as a Defendant precisely because he had no enforcement connection to the alleged ongoing violations of federal law. While *Disability Advocates v. Patterson*, 598 F.Supp. 289, 356, 57 (Eastern District 2009), declined to dismiss the governor in a suit involving claims similar to those in this action, the Court in that case analyzed the governor's status as a party under the far more liberal Rule 21 joinder standard. Here, I find the *Ex parte Young* analysis controls because Plaintiffs have failed to

specify Governor Cuomo's enforcement connection to the alleged violations of federal law, he is not a proper Defendant and is dismissed as a party.

Ryan, can you do me a favor. Can you text Walter and just ask him what the instructions are for people on the call to mute themselves or if he's able to come back. If they can't do it themselves, if he's able to come back and mute them for me, that would be great.

THE LAW CLERK: Will do, Judge. I just want to note if you're on a land line, if you hit Star 6, that should mute yourself.

THE COURT: Oh, that's good. All right. Everybody do that.

THE LAW CLERK: But I'll text Walter to see if he can do it on his end as well.

THE COURT: Maybe that's the way he would say to do it. Okay.

Turning now to Eleventh Amendment Immunity: In their initial memorandum of law at pages 17 to 20, Defendants argue that the Eleventh Amendment bars Plaintiffs' claims against DOCCS and OMH under Title II of the Americans with Disabilities Act, or ADA. After Plaintiff served their opposition, however, Defendants changed their position, noting that they, quote, agree with Plaintiffs that the Court need not reach the constitutional argument implicated by the question of sovereign

immunity as Plaintiffs have asserted a claim under Section 504 of the Rehabilitation Act. That's at page 12 of their reply. The parties appear to be in agreement on this point and -- but out of an abundance of caution, I will examine whether it is, in fact, appropriate for me to put off a ruling on this issue.

A state is, quote, immune from suits brought in federal courts by her own citizens as well as by citizens of another state absent that state's consent or a valid abrogation by congress, unquote. *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 280; see *Allen v. Cooper*, 140 Supreme Court 994, 1000, 1001, and *Pennhurst v. Halderman*, 465 U.S. 89, 100.

It is undisputed that OMH and DOCCS are both agencies of New York State, and as such are, quote, entitled to assert the state's Eleventh Amendment immunity where, for practical purposes, the agency is the alterego of the state --

All right. So somebody is in a car. That's a car door noise. Whoever you are, mute your cell phone. Sorry.

Quote, entitled to assert the state's Eleventh Amendment immunity where, for practical purposes, the agency is the alterego of the state and the state is the real party in interest, unquote. *Santiago v. New York State, DOCCS*, 945 F.2d 25, 28, Note 1. Accordingly, the key question for analysis is whether Congress validly abrogated that immunity under Title II of the ADA.

The Supreme Court's decision *United States versus Georgia*, 546 U.S. 151, held that the ADA validly abrogates sovereign immunity when a claim includes both a Title II violation and alleged Fourteenth Amendment violation, but left unresolved the question of whether Title II validly abrogates sovereign immunity for a cause of action based on conduct that allegedly violates Title II, but not a specific constitutional provision. See *Dean v. University of Buffalo*, 804 F.3d 178, 194 and *Bolmer v. Oliveira*, 594 F.3d 134, 148. As such, it is an open question whether sovereign immunity would prohibit a Title II claim against DOCCS and OHM.

There's a well-settled policy set by the Supreme Court, however, for federal courts to avoid deciding constitutional questions except where necessary. *Blair v. United States*, 250 U.S. 273, 279. Quote, Considerations of propriety, as well as long-established practice, demand that courts refrain from passing on the constitutionality of the law unless obliged to do so in the proper performance of our judicial function, where the question is raised by a party whose interest entitles them to raise it, unquote. That's *Blair* 279. See *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445 to 46, which discussed the quote, fundamental and longstanding principal of judicial restraint that requires courts to avoid reaching constitutional questions in advance of the necessity of deciding them.

Here, Plaintiffs also bring a Rehabilitation Act claim against the state agency Defendants, and the remedies available to Plaintiffs under Title II and the Rehabilitation Act, or RA, are identical. See 42 U.S. Code Section 12133. Further, it's clear that Section 504 constitutes a clear expression of Congress' intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity. *Garcia V. S.U.N.Y* at 113. RA claims are thus not barred by the Eleventh Amendment because New York has waived sovereign immunity as to such claims. *Keitt v. New York City*, 882 F.Supp.2d 412, 425 (Southern District 2011). Defendants do not challenge that the RA claims in this case can proceed without implicating the Eleventh Amendment.

Finally, the Second Circuit has indicated that courts should decide whether immunity applies at the pleadings stage particularly where, if successful, quote, the state would be exempted from participating in any pretrial procedures. *Smith v. Reagan*, 841 F.2d 28, 31. Here as extensive paper discovery has already occurred and as the discovery going forward will be the same regardless of whether it is aimed at the ADA claim or the RA claim, that is not an issue here. See *Smith* at 30 where the Courts said, quote, The purpose of an early determination of -- sorry. The purpose of early determinations of immunity defenses is, after all, to lift the burdens of litigation from a Defendant who should not be a party at all, unquote.

Accordingly, I need not resolve the sovereign immunity issue at the pleadings stage and agree with the parties that it would be inappropriate to do so. There is no need to decide the constitutionality of Title II's abrogation of sovereign immunity because the rights and remedies under Title II are the same as under the RA, and deciding the immunity question now would not prevent the state defendants from being "haled into court." *Smith* at 30. See *Ross v. CUNY*, 211 F. Supp. 3d, 518, 528 (E.D.N.Y. 2016). Deciding the issue now will not change the course of this litigation or the ultimate judgment to which Defendants may be subject. *T.W. v. New York State Board of Law Examiners*, 2019 Westlaw 6034987 at page 3, (Eastern District November 14, 2019). And accordingly, the motion to dismiss the ADA claims against DOCCS and OMH on sovereign immunity grounds is denied.

I now discuss the allegedly Redundant Claims: Defendants argue that the ADA and RA claims against Defendants Sullivan, Annucci and McGrath, who are sued in their official capacity, should be dismissed because they're redundant with the claims against the state entities themselves.

The Second Circuit recognizes that ADA and RA suits for prospective injunctive relief may proceed against state officers in their official capacities. See *Henrietta D. v. Bloomberg*, 331 F.3d 261, 289. Because no matter what, quote, the real party in interest in an official-capacity suit is the

government entity. It is irrelevant whether the judgment would impose individual liability on the officer sued since the suit is, in effect, against the public entity, unquote. *Harris v. Mills* 572 F.3d 66, 72. Plaintiffs may assert ADA claims against institutional Defendants or by naming individuals as Defendants in their representative or official capacities. *Duprey v. Prudential*, 910 F.Supp. 879, 884 (Northern District 1996). A Plaintiff might choose to sue an individual in that person's official capacity rather than a state institution to avoid Eleventh Amendment and sovereign immunity issues. *Hallett v. New York State Department of Correctional Services*, 109 F. Supp.2d 190, 199 to 200 (Southern District 2000).

But courts in the circuit will often dismiss official capacity Defendants when the Plaintiff can sue the government entity directly. *Candelaria v. Cunningham*, 2000 Westlaw 798636 at page 3 (Southern District June 20, 2000). See *Loadholt v. DOCCS*, 2009 Westlaw, 4230132 at page 3 (Western District November 24, 2009). And *Hallett* 109 F. Supp.2d at 199 to 200. Courts are not required, however, to dismiss these claims against official capacity Defendants as redundant with those against the state agency. See, for example, *Askins v. MTA*, 2020 Westlaw 1082423 at page 7 (Southern District March 5, 2020). *Maioriello v. New York State OPDD*, 2015 Westlaw 5749879 at page 19 to 20, (Western District September 30, 2015). *Askins v. New York City*, 2013 Westlaw 142007 at pages 3 to 5

(Southern District January 8, 2013.) And *Butterfield v. New York*, 1998 Westlaw 401533 at pages 16 to 17 (Southern District July 15, 1998). Lastly, courts will typically dismiss claims against the official capacity Defendants only when there are no other separate claims pending against those individuals. See *Fox v. S.U.N.Y*, 497 F. Supp.2d 446, 451 (Eastern District 2007) where the Court said, quote, Because the state is the real party in interest for the Plaintiffs' claims against the individual Defendants in official capacities, it would be redundant to permit these claims to proceed when the plaintiff already has a cause of action against the state and the remaining claims against the individual Defendants have been dismissed, unquote.

Here, as I will discuss shortly, other claims against the official capacity Defendants survive this motion to dismiss. So by necessity, those Defendants must remain in the case. I leave unresolved the question of sovereign immunity as to the Title II claims, so there is an additional reason why those claims against the official capacity Defendants should remain. That is because it's unclear at this stage whether Plaintiffs may or may not sue the government entity directly on the ADA Title II claim as set forth in *Candelaria* at 3. It may be that the official capacity Defendants are the only valid avenue through which to pursue this claim. Lastly, dismissal of the official capacity Defendants would not promote any

economy of resources at this stage of the litigation and because the parties don't dispute that the real party in interest in an official-capacity suit is the government entity, the effect of any eventual judgment will be the same on the official capacity and institutional Defendants. *Harris* at 72. So Defendants' motion to dismiss the claims against the official capacity Defendants as redundant is thus denied.

Turning now to Mootness: That is a, quote, doctrinal restriction stemming from the Article III requirement that federal courts decide only live cases or controversies. A case is moot if the parties lack a legally cognizable interest in the outcome of the case. *In re Zarnel*, 619 F.3d 156, 162. See *Powell v. McCormack*, 395 U.S. 486, 496. The Supreme Court, however, has long recognized exceptions to this doctrine. See, for example, *U.S. Parole Commission v. Geraghty*, 455 U.S. 388, 399. These exceptions, quote, are particularly applicable in class action cases in the ... civil rights arena, unquote. *Samele v. Zucker*, 324 F. Supp. 3d, 313, 328 (Eastern District 2018).

Defendants present two arguments for why this case should be dismissed as moot. The first is that, quote, the transfer of ... the named Plaintiffs to residences in the community constitutes an intervening circumstance that deprives these Defendants of a personal stake in the outcome of the litigation, unquote. And, quote, mitigates the concern that,

absent injunctive relief, they will be subject to allegedly unconstitutional conduct in the future, unquote. That's at Defendants' memo at page 10. And the second is that, quote, DOCCS has issued a policy memorandum advising responsible supervisory staff at statewide, that inmates within the definitions of the putative classes here will not be held past their respective release dates because of an unmet need for mental health housing, unquote. That's in Defendants' reply at 4. Plaintiffs, conversely, argue that several exceptions to mootness apply here, and the Defendants have failed to satisfy their formidable burden to show mootness.

First I'm going to discuss the release of the individual Plaintiffs and then I'll turn to the memorandum.

Defendants first argue that to the extent Plaintiffs C.J., M.J., J.R., D.R. and M.G. seek release from RTFs or prison or seek to assert claims on behalf of either putative class, their claims are moot because they have been released. That's in Defendants' memo at 7. This argument also presumably now includes Plaintiffs PC, according to Defendants' letter of May 8, 2020, which is Docket Entry 124. Defendants' argument posits that the transfer of the named Plaintiffs to residences in the community is an intervening circumstance that deprives these Plaintiffs of a personal stake in the outcome of the litigation and the concern that they'll be subject to unconstitutional conduct in the future. See *Shannon v.*

Venettozzi, 749 F. App 10,13, citing *Salahuddin v. Goord*, 467 F.3d 263, 272. Defendants contend that the claims asserted by these named Plaintiffs in the general class and the RTF Subclass, (collectively, I'm going to call these people the original named Plaintiffs) are no longer alive because they now lack legally cognizable interest in resolution of this matter.

I understand Judge Smith's concerns about the potential for the new facts and allegations in the SAC to change the calculus for deciding Defendants' motion on this point. To the extent the allegations in the SAC relate to the claims of the original Plaintiffs, I should await full briefing addressed to the SAC. But to the extent the new facts and allegations apply to the new Discharge Class and not the general class and the RTF Subclass, mootness has been briefed. In addition to the RTF class's claims under the Eighth and Fourteenth Amendments, the general class's claim and, therefore, the claim of all the original named Plaintiffs in the FAC, is that under the ADA and the RA, the Defendants are obligated to see to it that Plaintiffs receive services in the most integrated setting appropriate to their needs and that Defendants have not done so because they have caused Plaintiffs to be institutionalized and segregated in state prisons, rather than provided adequate residential placements in the most integrated setting that's appropriate. That's from the FAC paragraph 408. See also paragraph 419, where it's alleged that

Defendants caused Plaintiffs to receive programs and services in the institutionalized and segregated setting of state prisons, rather than in the most integrated setting appropriate to their needs.

The gist of the general class's claim looks to me they are being held in prison too long. While the new claims for the discharged claim specifically address the conditions in which those who have been discharged now find themselves, and the allegedly inadequate level of integration in those settings, the claims of the original named Plaintiffs in both the SAC and the FAC do not seem to focus, at least not primarily, on the argument that the places they were eventually put are inadequate. The claims saying that Defendants have discriminated against Plaintiffs by placing them in segregated settings like shelters, see SAC paragraphs 762 and 773, are advanced mainly in connection with the new discharge class Plaintiffs. Accordingly, while the SAC explicitly includes new facts about some of the original named Plaintiffs, see paragraphs 46, 48 through 64 and 82 through 89, and expands the scope of facts and allegations regarding segregated settings into which Plaintiffs are discharged, see, for example, paragraphs 390 to 391, 398 to 419, 457, 486 to 90, 495, 636 to 37, 656, 659 and 699, I do not believe this has hindered by ability to rule on Defendants' motion to the extent the claim is that the original Plaintiffs were held in prison too long.

To the extent their claim is that the conditions into which they were released are not sufficiently integrated, the new allegations that facts in the SAC change the scope and nature of the claims and because their effects on Defendants' mootness arguments have not been briefed, Defendants' motion is denied without prejudice to renewal to that extent.

To the extent Plaintiffs' claims relate to their being held in prison too long, I'm going to address the claim. Defendants say that release of a named Plaintiff has mooted these claims, plaintiffs say that three exceptions to mootness apply: Voluntary cessation, picking off of the named Plaintiffs, and the inherently transitory nature of the claims. As I'll discuss momentarily, I find that at least the inherently transitory exception applies, at least at this stage.

The mootness doctrine has, quote, weathered a complex history, unquote, in the context of class actions *Eckert v. Equitable Life* 227, F.R.D., 60, 63 (Eastern District 2005), and thus presents the court with special concerns. Although the mootness inquiry is intensely factual and situational, Eckert at 63, as a general rule, if the claims of a named Plaintiff are resolved before the Court certifies the class, the entire action is mooted. *Comer v. Cicneros* 37 F.3d 775, 798. See *Jobie O. v. Spitzer*, 2007 Westlaw 4302921, at page 4, (Southern District December 5, 2007). Quote, class certification acts as

a lifeboat for a claim that would otherwise be moot due to the resolution of Plaintiffs' claims, unquote, because the class, quote, acquires a legal status separate from the interest asserted by the named plaintiff, unquote, *Eckert* at 63, see *Jobie O.* at 5, but where no class has been certified, generally the class claims do not survive.

Quote, Where class claims are inherently transitory, however, the termination of the class representative's claim does not moot the claims of the unnamed members of the class, unquote. *Robidoux v. Celani*, 987 F.2d, 931, 938 to 39. This is because, quote, some claims are so inherently transitory that the trial court will not have ... enough time to rule on a motion for class certification before the proposed representative's individual interest expires, unquote. *Mental Disability Law Clinic v. Hogan*, 2008 Westlaw 4104460 at page 9, (Eastern District August 28, 2008). Quote, under this mootness exception, a case will not be moot, even if the controversy as to the named Plaintiffs has been resolved, if: (1), it is uncertain that a claim will remain live for any individual who could be named as a Plaintiff long enough for the Court to certify the class; and (2), there will be a constant class of persons suffering the deprivation complained of in the complaint, unquote. *Salazar v. King*, 822 F.3d 61, 73. When these criteria are met, quote, courts permit the class certification to relate back to filing of the complaint and

hold that the Plaintiffs have properly preserved the merits of the case for judicial resolution, unquote. *Comer*, 37 F.3d at 799.

Defendants assert that for Plaintiffs to be entitled to this mootness exception, Plaintiffs must have filed a motion for class certification while they have live claims. That's in Defendants' reply at 2. Several district courts in this circuit, however, have concluded that Second Circuit has no such requirement. See, for example, *Bellin v. Zucker*, 2020 Westlaw 2086009 at pages 3 to 4, (Southern District April 30, 2020); *Hogan* 2008 Westlaw 4104460 at page 9; *Eckert* 227 F.R.D. at 63 to 64; and *German v. Federal Home Loan Mortgage Corp.* 896 F.Supp. 1385, 1399 (Southern District 1995). Instead, these courts have found that the case can move forward, quote, in situations where a Plaintiff has not yet had a reasonable opportunity to file a motion for class certification; namely, where there has been no undue delay, the Court retains subject matter jurisdiction despite the Plaintiffs' failure to move for class certification, unquote. *Eckert* at 63, 64.

I find these cases convincing. I don't believe that Plaintiffs must file a motion for class certification with the class complaint or early on in discovery, particularly where any such motion would have to be bare-bones, just to avoid mootness. Requiring the motion to avoid mootness is especially inappropriate here where Defendants have always maintained that

Plaintiffs' status in prison was temporary until housing became available. See Defendants' reply at 10. Plaintiffs' release was entirely within Defendants' control and Defendants seem to have strategically released Plaintiffs in response to the lawsuit. Additionally, discovery in this case is ongoing. Plaintiffs have sought discovery on issues relevant to class certification and in a case of this complexity, the delay in moving for class certification is not excessive. See *Greif v. Wilson Elser*, 258 F. Supp.2d, 157, 161 (Eastern District 2003) where the Court declined to apply the relation back doctrine when after a 20-month delay, the plaintiff did not indicate that she was prevented from commencing discovery or moving for class certification. In that case, Plaintiff hadn't even sought discovery. So there was undue delay. But here, discovery has been ongoing.

In short, although many of the cases applying the relation back doctrine have done so after a motion to certify the class has been previously been filed, I do not see the filing of such a motion as a requirement. As long as a, quote, justiciable controversy exists some point prior to class certification, unquote, and Plaintiffs have not, unquote, unduly delayed, unquote, the relation back doctrine will serve to preserve the action if the requirements of the inherently transitory exception are met. *Crisci v. Shalala*, 169 F.R.D. 563, 567 (S.D.N.Y., 1996). I note that the second circuit is

considering this issue in the Bellin case, so that decision could change things sooner or later.

Turning now to whether the requirements of the inherently transitory doctrine are met, I find the first prong is easily satisfied here, as plaintiffs were held in temporary status due to the unavailability of community-based mental health housing. Defendants concede that this was meant to be a short-term solution to a housing shortage, which meant that Plaintiffs could be released at any time once housing became available. See Defendants' reply at 10. Furthermore, Plaintiffs have shown that Defendants had discretion for when and where to release plaintiffs, and as demonstrated by the evidence provided by Plaintiffs, prioritized the release of named Plaintiffs after this litigation was filed. See evidence summarized in Plaintiffs' memorandum at page 5 and notes 4 through 7.

It is clearly uncertain, therefore, that a claim could remain live for any individual who could be named as a Plaintiff long enough for the Court to certify a class. See *Salazar* at 73.

The second prong of the analysis, that there will be a constant class of persons suffering the deprivation complained of in the complaint, is more difficult for Plaintiffs to show at this stage, in light of Defendants' policy memorandum which Defendants argue in the challenge to practice. When the action

was commenced and before Defendants issued their purported policy change, however, Plaintiffs clearly could show and Defendants could not dispute that there were a, quote, fluctuating number of people in prison past their ... release dates, unquote. Plaintiffs' memorandum at 11. See Rosenthal Declaration, Exhibit 87 at 4, 5, 8, 9 through 10 and 11. Plaintiffs' ability to demonstrate this constant class or not is now inextricably tied to Defendants' purported voluntary cessation of the challenged conduct. If the practice has stopped, there will not be a constant class. And if it has not stopped, there will be. As I will discuss in a moment, Defendants have not sufficiently shown here that they have actually stopped this practice, at least not yet. Because, as I will explain, I find that the memorandum and policy change do not show that the challenged conduct has, in fact, ceased, and that there may be a reasonable expectation that the challenged conduct will recur, I think it is plausible that there is or will be a constant class of persons suffering the deprivation.

Because Plaintiffs have shown that the claims at issue here are inherently transitory and they have not unduly delayed in bringing the motion for class certification, the motion as to mootness is denied as it relates to the claims of the original named Plaintiffs.

Turning now to the Policy Memorandum: Defendants argue that the allegations in the FAC are moot because DOCCS has,

quote, committed to discontinue the practices complained of in the amended complaint, unquote. And, quote, issued a policy memorandum advising responsible supervisory staff statewide that inmates within the definitions of the putative classes here will not be held past their respective release dates because of an unmet need for mental health housing, unquote. Defendants' reply at page 4. I believe this argument has been sufficiently briefed, including with the sur-replies that I may rule on it.

A Defendant's voluntarily cessation of challenged conduct will only moot a lawsuit if, quote, the challenged conduct has, in fact, ceased, unquote. Quote, there is no reasonable expectation that the alleged violation will recur, unquote. And, quote, interim relief or events have completely and irrevocably eradicated the effects of the alleged violation, unquote. *American Freedom v. MTA*, 815 F.3d 105, 109; see *Seidemann v. Bowen*, 499 F.3d 119, 128; *Ciaramella v. Zucker*, 2019 Westlaw 4805553, at page 5, (Southern District September 30, 2019).

Usually, a party's, quote, voluntary cessation of allegedly unlawful conduct ... does not suffice to moot a case, unquote. *N.Y. Pub v. Whitman*, 321 F.3d 316, 327, quoting *Friends of the Earth v. Laidlaw*, 528 U.S.167, 174. A party, quote, claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely

clear that the allegedly wrongful behavior could not reasonably be expected to occur, unquote. *Seidemann* 499 F.3d at 128, because, quote, a party should not be able to evade judicial review ... by temporarily altering questionable behavior, unquote. *City News v City of Waukesha*, 531 U.S. 278, at 284, Note 1. This is of particular concern in cases where Plaintiffs are, quote, prisoners, who are at the mercy of their keepers, unquote. *Inmates of Attica v. Rockefeller* 453 F.2d 12, 23 to 24.

DOCCS alleges that this policy change, and the half-page memorandum sent to "All Superintendents and Community Supervision Bureau Chiefs" -- I'm quoting that from Exhibit 1 of the Enright Declaration -- satisfies their burden to show that the effects of their actions are completely and irrevocably eradicated, that the conduct has ceased, and that there's no reasonable expectation that the alleged violation will recur. I cannot agree at this stage.

First, Defendants have not demonstrated they have in fact ceased the practice of prolonging the institutionalization of members of the putative classes in prison, and in circumstances such as these, this memorandum alone does not convince me that the practice has in fact changed. See *Salem versus Pompeo*, 432 F. Supp. 3d, 222 at 234, Eastern District, 2020. Where evidence of noncompliance with a new policy weighed against mootness. It appears from the record that the same practices

could and may well continue either because Defendants obtained, quote/unquote, waivers of release from seriously mentally ill prisoners, see Rosenthal Declaration Exhibit 105 and Exhibit 103 at 119, for which there's no formal process other than signing a statement, Rosenthal Declaration Exhibit 103 at 19, or because of delays in release for, quote, unforeseen circumstances, unquote, as referenced in the Enright declaration, Document 92 paragraph 14, and Defendants' interrogatory responses. While Defendants assure the Court that these, quote, unforeseen circumstances, unquote, would only, quote, temporarily, unquote, delay an individual's release, giving examples such as, quote, unexpected medical issues, transportation problems, extreme weather, or a severe psychiatric episode that requires observation, unquote, they conclude this list by including, seemingly as an afterthought, a, quote, temporary delay in housing availability (such as a fire or other event), unquote. That's Docket Entry 114-1 at 15. The entire crux of Plaintiffs' complaint arises from temporary delays in housing availability. Defendants have not shown that there is no possibility that a seriously mentally ill prisoner will be kept in prison beyond his release date when they have not disavowed seeking waivers and when they reserve the right to prolong incarceration due to unforeseen circumstances.

Beyond these loopholes in the new policy, Defendants have

not -- Defendants have shown that the memorandum has been issued, but have not shown that it has, in fact, been implemented to ensure that Defendants no longer hold individuals with serious mental illness in prison past their release date or that all Defendants named in this case have foreclosed the possibility of continuing the practice.

Defendant Sullivan, the OMH Commissioner, stated unequivocally in her interrogatory responses, that, quote, no OMH policies, rules, practices, procedures, systems, et cetera, were changed as a result of the DOCCS implementation of its policy as set forth in the DOCCS memorandum. This memorandum set forth a DOCCS policy that has not changed or required a change to any OMH policy or procedure, unquote. Rosenthal Declaration Exhibit 104 at 4. Additionally, DOCCS did not require any training or other mechanisms to ensure that staff actually implement the memorandum and policy change properly. Rosenthal Declaration Exhibit 103 at 11 and Exhibit 116 at 6. And, in fact, DOCCS decided that no new training was required to implement the policy change beyond the memorandum, Rosenthal Declaration Exhibit 103 at 10, despite the fact that large numbers of Defendants' staff, spread out across a large and diverse system throughout the state, are tasked with its implementation, and it represents a significant change from past practice.

It is also of concern that throughout the litigation,

including in their briefs on this motion, Defendants have continued to justify their decision to hold indigent individuals with serious mental illness past their lawful release dates by reference to unspecified, quote, penological justifications and safety concerns, unquote. For example, Docket Entry 80 at 2, and 21 to 22, Defendants' reply at 10, Document 103 at 3, and Document 114-1 at 7 to 8. These types of arguments do not inspire confidence that the complained-of conduct is completely and irrevocably eradicated, or that it might not recur upon a change of administration, change of policy, or change of mind, particularly because the change in policy appears to be at least an intentional response to the lawsuit and perhaps an effort to moot the lawsuit. See *Edelhertz v. City of Middletown*, 2013 Westlaw 4038605 at pages 3 to 4 (Southern District May 6, 2013) which found a case was not moot where the statute was changed in response to the lawsuit and nothing prevented the Defendants reenacting it if the case were dismissed.

Defendants, to refute these concerns, point to my decision in *Inside Connect v. Fischer*, 2014 Westlaw 2933221, at pages 8 to 9, from June 30, 2014, where I dismissed an action for injunctive relief against DOCCS officials. In that case, however, the evidence presented clearly showed that the challenged conduct had, in fact, ceased a year before. The underlying reason that motivated the challenged conduct in the

first place no longer existed, and the Plaintiff offered nothing more than baseless speculation that DOCCS was continuing the challenged conduct.

While Defendants are correct that there's nothing suspicious about their making efforts to resolve the problematic conduct on their own, see Defendants sur-reply at page 7, in order to moot a claim, Defendants must demonstrate both that they have ended the conduct and that the conduct will not resume once the Court is no longer looking over their shoulders. I am reminded of the *NYPIRG* case where The Second Circuit found that the state agency's implementation of a commitment letter to halt the challenged conduct was, quote, indicative of a degree of good faith, unquote, but nevertheless failed to show that it was, quote, absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, unquote. 321 F.3d at F27. As both the Supreme Court and The Second Circuit have stated, merely disclaiming any intention to resume challenged conduct is insufficient to moot a case. *United States v. W.T. Grant*, 345 U.S. 629, 633 and *Dean v. Blumenthal*, 577 F.3d 60, 65. Here, in circulating a half-page memorandum with a broad exception, while continuing to justify the policy reasons behind their original practice, Defendants here have failed to satisfy their burden and the motion is therefore denied as to the policy memorandum.

That said, it is plain to me that Defendants, with the

guidance of the Attorney General's office, recognize and are trying to rectify the problems this lawsuit has highlighted and they may yet demonstrate to my satisfaction that the conduct has, in fact, ceased as the policy change is further implemented. I hope the parties will continue to work on whether a negotiated solution is possible, recognizing on the one hand that Defendants may be able to show mootness in the future and recognizing that the state budget is in worse shape than ever, and on the other hand recognizing that the rights of disabled people are at stake.

Turning now to Failure to Exhaust: Defendants argue that Plaintiffs' claims must be dismissed for failure to exhaust their administrative remedies as required by federal law. Exhaustion is an affirmative defense, not a pleading requirement; thus, inmate Plaintiffs need not, quote, specifically plead or demonstrate exhaustion in their complaints, unquote. *Jones v. Bock*, 549, U.S.199 at 216. Instead, Defendants must demonstrate lack of exhaustion. *Colon v. DOCCS*, 2017 Westlaw 4157372 at page 4 (Southern District September 15, 2017). Because of the extraneous evidence involved, Defendants' exhaustion requirement must be converted to a motion for summary judgment under Rule 12(d).

Under the Prison Litigation Reform Act, or PLRA, quote, no action shall be brought with respect to prison conditions under ... any federal law, by a prisoner confined in any jail,

prison, or other correctional facility until such administrative remedies as are available are exhausted, unquote. 42 U.S. Code Section 1997e(a). By the plain terms of the statute, the administrative exhaustion requirement applies only to, quote, prisoners, unquote. See *Greig v. Goord*, 169 F.3d 165, 167, where the Second Circuit held that litigants who file prison condition actions after their release from confinement are no longer prisoners for purposes of Section 1997 e(a) and, therefore, need not satisfy the exhaustion requirement.

Plaintiffs do not dispute that the general class Plaintiffs are prisoners within the meaning of the PLRA and, thus, are required to exhaust. But they argue in their memo at page 13 that the RTF Plaintiffs are not because their sentences have fully ended. The PRLA defines a prisoner as, quote, any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary programs, unquote. That's 42 U.S. Code Section 1997e(h). The Second Circuit has clarified that exhaustion applies only to facilities in which people are, quote, held involuntarily as a result of violating the criminal law, unquote. *Ruggiero v. County of Orange*, 467 F.3d 170 at 174 to 75. This definition applies to, quote, suits filed by all litigants who could be

characterized as prisoners regardless of the type of facility in which they are imprisoned, unquote. *Ruggiero* at 175.

In asserting that Plaintiffs are prisoners required to exhaust, Defendants incorrectly state that the PLRA's exhaustion requirement applies to, quote, all facilities in which individuals are held involuntarily, unquote. That's in their brief -- in their memorandum at pages 12 to 13. But what the phrase actually is, is facilities where individuals are, quote, held involuntarily as a result of violating the criminal law. By Defendants' own definition, the RTF Plaintiffs were not so held on the day they filed this lawsuit. Defendants concede that the RTF Plaintiffs were being held not because they owed any more time on the violation of criminal law that landed them in prison, but because there was, in Defendants' view, no suitable place to which to release them. Because the RTF Plaintiffs were not prisoners when they filed, exhaustion was not required.

Ruggiero, on which Defendants rely, is easily distinguishable from this case, as the Plaintiff there was confined because of a parole violation which arises from failing to abide by conditions of early release from a criminal sentence and is unambiguously a sentence resulting from a violation of the criminal law. See *Ruggiero* at 175. In contrast, the RTF Subclass, having completed the entirety of the determinate sentences when they filed this complaint, were

not confined because of a violation of the criminal law. They were explicitly held past those sentences by Defendants' own admission to, quote, protect the safety and continuity of care of Plaintiffs as well as the safety of the community, unquote, and because there was no community-based mental health housing available. Defendants' memorandum at 21 to 22. Therefore, I find the RTF Plaintiffs are not prisoners within the meaning of the PLRA. I also note that, interestingly, when arguing exhaustion, Defendants assert that Plaintiffs are prisoners for purposes of the PLRA, in their memorandum at 12, but for purposes of the Eighth Amendment claim, which I'll discuss below, Defendants claim that conditions in the RTF are not punishment for a violation of criminal law. That's at page 21 of their brief.

Although I find the exhaustion requirement does not apply to the RTF Subclass, Plaintiffs do not dispute that it does apply to M.G. and P.C., who are the general class Plaintiffs. Out of an abundance of caution, I will also address whether all Plaintiffs, not just M.G. and P.C., did, in fact, exhaust their administrative remedies before filing suits. Defendants here only challenge whether Plaintiffs adequately appealed their grievances to the Central Office Review Committee, or "CORC," and whether they adequately waited until CORC rendered a decision before bringing this lawsuit and they reserved their rights to dispute other issues regarding administrative

exhaustion at a later time. See Defendants' Memo at 15, Note 7. As such, I will confine my analysis to that issue.

In order to exhaust under the PLRA, a prisoner must follow the administrative procedures that are available to them; namely, the prison's grievance policy. *Jones* 549 U.S. at 218. The individual must, quote, use all steps that the agency holds out and do so properly, unquote. *Woodford v. Ngo*, 548 U.S.81 at 90. That includes complying with an agency's deadlines and other critical procedure rules. *Woodford* at 90.

DOCCS's grievance regulations provide two procedural paths that are relevant in this instance. For complaints regarding disability-based discrimination, which the regulations say are, quote, of particular concern, unquote, to DOCCS, the agency provides for an expedited two-step adjudication process found at 7 NYCRR Section 701.9. Discrimination grievances must be sent directly to the facility superintendent for adjudication. If the superintendent denies the grievance, the grievant may appeal directly to the final level, which is CORC. CORC must render a decision within 30 days of receipt. See 7 NYCRR Section 701.9, which incorporates Section 701.5(d)(3)(ii). Complaints that do not allege unlawful discrimination, on the other hand, are subject to a three-step process. These complaints are adjudicated by the Inmate Grievance Resolution Committee, or "IGRC." If the IGRC denies the grievance, the grievant must appeal to the superintendent. And if the

superintendent denies the appeal, the grievant must appeal to CORC, which must adjudicate the appeal within 30 days. That's all in Section 701.5.

Under either of these procedural paths, CORC must obtain the individual's written consent if it requires more than 30 days to adjudicate the appeal. See Section 701.6(g)(2), which says, quote, time limit extensions may be requested at any level of review, (e.g., time limits for holding an IGRC hearing answering a grievance or an appeal, et cetera). But such extensions may be granted only with a written consent of the grievant, unquote. And at any level of review, quote, matters not decided within the time limits may be appealed to the next step, unquote. That's all from 701.6(g)(2).

The regulations, quote, provide no mechanism for enforcing the requirement that the CORC issue a decision in 30 days, unquote. *Couvertier v. Jackson*, 2014 Westlaw 2781011, at page 4, (Northern District May 22, 2014). Indeed, courts have struggled with the question of what to do in situations where CORC does not comply with the 30-day deadline. As, quote, there is no clear answer as to how a court should proceed under the PLRA when it appears that an inmate Plaintiff has followed all the requirements of his institution's administrative procedures, but the final review panel is delinquent in its response to his appeal, unquote. This is because courts try to balance two competing sentiments that, quote, an inmate

Plaintiff should not be penalized for their institution's failure to follow its own administrative procedures, unquote. But, quote, in light of the PLRA's purpose, courts should hesitate to decide the underlying action, unquote, before allowing CORC to have its say. *Fuentes v. Furco*, 2014 Westlaw, 4792110 at page 3 (Southern District September 25, 2014).

The Second Circuit has not addressed this issue, but district courts in the Circuit have fashioned solutions that attempt to balance the PLRA's goal of allowing institutions the first opportunity to address an inmate's grievances, against the inmate's right to a federal forum when they have complied with all of the procedural requirements. I will attempt to do so here.

Under the PLRA, only those administrative remedies that, quote, are available, unquote, must be exhausted. That's 1997e(a). "Availability" means that the incarcerated person, quote, is required to exhaust those, but only those, grievance procedures that are capable of use to obtain some relief for the action complained of, unquote. *Ross v. Blake*, 136 Supreme Court 1850, 1859. *Ross* outlined three circumstances under which a prison's administrative remedies are unavailable: First, when an administrative procedure, quote, operates as a the simple dead end, unquote; next, when, quote, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use, unquote; and finally,

when, quote, prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation or intimidation. That's *Ross* at 1859 to 60.

While The Second Circuit, quote, has not adopted the position ... that delay in responding to a grievance demonstrates per se unavailability, unquote, *Mateo v. O'Connor*, 2012 Westlaw 1075830, at page 7 (Southern District March 29, 2012), many district courts have held that a delay in some circumstances may constitute unavailability that would excuse a Plaintiff from exhausting. See, for example, *Smith v. Lioidice*, 2020 Westlaw 1033644, at page 4 (Southern District March 2nd, 2020); *Bell v. Napoli*, 2018 Westlaw 6506072, at page 7 (Northern District December 11, 2018); *Peoples v. Fischer*, 2012 Westlaw 1575302, at page 9 and Note 125 (Southern District May 3, 2012). I find these cases convincing, especially because DOCCS's own regulations specify that, at every level of the process, quote, matters not decided within the time limits may be appealed to the next step, unquote. That's Section 701.6(g)(2). To hold otherwise would incentivize prisons to ignore the deadlines in the regulations in an effort to prevent prisoners from seeking redress in federal courts. This holding comports with the Supreme Court's command that an inmate Plaintiff's compliance with prison grievance procedures is all that's required by the PLRA to properly exhaust. *Jones* 549 U.S. at 218.

Considering that view of the legal question and the factual record before me, Defendants have not demonstrated that they are entitled to summary judgment based on failure to exhaust. Based on the factual record and exhibits submitted, many of which are under seal, it's apparent that all of the Plaintiffs have at least raised fact issues as to whether they've adequately exhausted all available remedies. Exhibit A to the Sequin Declaration, Document 81-1, shows that CORC has records of appeals from D.R. and J R. CORC received D.R.'s appeal on November 19, 2018 and informed him in writing, without his consent, that his appeal would be resolved in approximately one year, more than 12 times the allotted 30 days. Neither D.R. nor J.R., whose appeal to CORC was received on November 27, 2018, got a response from CORC by the time the briefs for this motion were filed in late 2019 and early 2020. CORC thus seems to be a simple dead end in their cases. So summary judgment is not warranted.

Defendants' allegation that C.J. did not file his CORC appeal until after the filing of this lawsuit, see Sequin Declaration paragraph 6, is incorrect, although it is true that CORC did not receive his appeal until February 2019, after the lawsuit was filed on January 23, 2019. C.J. says he filed two CORC appeals, on November 28, 2018 and again on December 3rd, 2018. This is in his declaration. When CORC failed to respond, according to C.J., he wrote two separate letters to

the Green Haven Grievance Program Supervisor, seeking confirmation under Section 701.5(d)(3)(i) that his appeals were transmitted. In response, the grievance clerk orally assured C.J. that he had personally handed the appeals to the grievance program supervisor for transmittal to CORC, and that the supervisor had done so. Despite these assurances, the supervisor inexplicably waited over two months to actually transfer the appeal to CORC. To me, the false reassurance and the unexplained and seemingly needless delay falls within the *Ross* exception where administrative processes become unavailable due to prison administrators thwarting inmates through machination or misrepresentation. Because C.J.'s account, if true, could show that he has exhausted, summary judgment in Defendants' favor is inappropriate.

Turning to M.J. According to him, on October 18, 2018, while incarcerated in the Fishkill Correctional Facility, he filed his original grievance. And by the way, the C.J. declaration covers this in paragraphs 18 through 21. The M.J. declaration, which I'm going to refer to now, discusses this in paragraphs 11 through 21.

M.J. was at Fishkill when he filed his initial grievance, but before he got a response, DOCCS transferred him to Green Haven. Fishkill did not forward any response to M.J. there, leaving him confused about how to exhaust because he didn't receive the denial of his Fishkill grievance within the

regulatory time limit and did not have an appeal form on which to submit his appeal. On November 17, 2018, he mailed a letter to the Fishkill grievance clerk, stating his intent to appeal the constructive denial of his grievance. On December 2nd, he received the Fishkill superintendent's denial of his appeal and the next day he mailed the CORC appeal to the Fishkill grievance clerk. He never received confirmation from Fishkill that he they received his appeal or transferred it to CORC and his letters following up went unanswered.

P.C. similarly says he filed a discrimination grievance at the Sullivan Correctional Facility, and he got the Defendant -- the superintendent's denial on December 3rd, 2018. The next day he signed and submitted his CORC appeal. Despite sending a follow-up letter to the grievance staff after 30 days, he never heard back.

Assuming the truth of M.J.'s and P.C.'s accounts as I must on a motion for summary judgment, by failing to transmit their appeals or even respond to their inquiries to confirm transfer, the administrative processes as applied to them plainly operated as a simple dead end or were so opaque that they became, practically speaking, incapable of use. As set forth in *Ross* at 1859 to 60. Thus again, summary judgment for Defendants is not warranted.

Lastly, M.G. avers that he filed a grievance alleging discrimination on November 13, 2018 and that the agency

properly forwarded it to the superintendent directly on November 26, 2018. He got a denial, which stated that the grievance was forwarded to the OMH Unit Chief for, quote, whatever remedial action is deemed appropriate, unquote, and stated that, quote, this superintendent's response completes the grievance process and there is no further appeal available, unquote. Quackenbush Declaration Exhibit 102; and M.G. Declaration Paragraph 14. M.G., nevertheless, submitted a CORC appeal on the day that he received the denial. Quackenbush Declaration Exhibit 102, M.G. Declaration Paragraph 15. By telling M.G. that the superintendent's response completed the grievance process and there was no further appeal available, DOCCS staff told M.G., in essence, that he had exhausted the administrative process. Even if he had not, in fact, exhausted all of his appeals, this letter demonstrates that any further appeal would operate as a dead end or that prison officials prevented him from taking advantage of the grievance process through machination or misrepresentation.

Plaintiffs have all presented facts that, if true, would constitute or excuse exhaustion. Contrary to Defendants' arguments that a grievant must outwait CORC, it is, quote, the prison's requirements ... that define the boundaries of proper exhaustion. *Jones* 549 U.S. at 218. This rule is also consistent with The Second Circuit's holding that remedies are unavailable in situations that the grievance regulations -- the

grievant's regulations did not contemplate. *Williams v. Correction Officer Priatno*, 829 F.3d 118 at 124. That is exactly where all the Plaintiffs found themselves after timely appealing grievances to CORC, which then failed to issue decisions within its regulatory time limit. The regulations required nothing more from Plaintiffs in order to satisfy the exhaustion requirement.

As an aside, I see this issue coming up more and more frequently in my cases with DOCCS. Because this particular case has the attention of higher-level officials at the AG's office and at DOCCS, maybe this is a good time to point out that CORC seems to be way behind in a lot of cases and that that is making more work both for the AG's office and ultimately DOCCS, not to mention the Court, due to motion practice and factual disputes. I understand that resources are tight, but CORC clearing that backlog would ultimately save resources. And I know we're in a pandemic, but this problem has been rearing its head well before that. So just a little editorial aside there.

Turning now to the Eighth Amendment: The FAC alleges that Defendants have violated the Eighth Amendment rights of the RTF Subclass. The Eighth Amendment's ban on cruel and unusual punishment bars punishment that is grossly disproportionate or that violates evolving standards of decency that marks the progress of a maturing society. *Rhodes v. Chapman*, 452 U.S.

337 at 346. Plaintiff has alleged Eighth Amendment violations under two different theories: Prolonged incarceration and criminalization of status. I will address each in turn.

Starting with Prolonged Incarceration: Courts have noted that holding an offender beyond, quote, the maximum expiration date of their sentence may, in some circumstances, unquote, give rise to a claim under the Eighth Amendment. *Washington v. New York State Parole*, 2019 Westlaw 1877343, at page 2 (Southern District April 26, 2019). See *Wright v. Kane*, 1997 Westlaw 746457 at page 4, (Southern District December 2nd, 1997). Consignment that exceeds a term of imprisonment violates the Eighth Amendment if (1) the alleged deprivation is, in objective terms, sufficiently serious. And (2) Defendants acted with a sufficiently culpable state of mind. *Francis v. Fiacco*, 942 F.3d 126, 150. See *Calhoun v. New York*, 999 F.2d 647, 652, which looked at whether the length of added confinement inflicted, quote, a harm of ... magnitude, unquote.

The requisite state of mind is deliberate indifference. See, for example, *Calhoun* at 654. In this context, it requires a showing that official knows the risk of unwarranted punishment, failed to act or took only ineffectual action, and that there's a causal connection between the official's response and the unjustified detention. *Rivera v. Carroll*, 2009 Westlaw 2365240, at page 6 (Southern District August 3rd, 2009).

Defendants placed the RTF Plaintiffs' in RTF between 246 and 502 days past the end of their sentences. See FAC paragraphs 54, 90, 119 and 148. These are lengths of time that I find to be sufficiently serious and a harm of magnitude.

See *Calhoun* at 654, and *Rivera*, 2009 Westlaw 2365240 at page 3 and 7 to 8, which found a sufficiently serious harm from over-detention of 47 days.

Defendants point out that no case has found state Defendants liable, quote, where the state Defendants weighed the proper course of action, acted in accordance with a reasonable understanding of a complicated area of state law, and relayed the legal basis for their actions, unquote, to the Plaintiff. And they're quoting *Francis*, 942 F.3d at 150.

I find *Francis* to be easily distinguishable. The Court in *Francis* found the individual Defendants sued in their personal capacities were entitled to qualified immunity, which is not an issue where the Defendants are sued only in their official capacities. In addition, Plaintiff there was challenging how officials had calculated his sentence in the unique individual circumstances of his case. He was not like Plaintiffs here, challenging a concerted policy decision applied intentionally in case after case. Further, Francis was decided on summary judgment. While the record here may some day show that Defendants did their best to comply with the complicated statutory regime, Plaintiffs have plausibly alleged that they

did not. Plaintiffs allege that Defendants were well aware of their required release dates, their housing needs, and the systemic deficiencies in housing, and nonetheless decided to continue their incarceration past their release dates in circumstances essentially indistinguishable from prison. See, for example, FAC paragraphs 230, 273 to 75, 279 to 80, 283, 354 to 59, 367 to 369 and 373. While facts may certainly arise as the litigation proceeds that shed further light on Defendants' conduct and state of mind, I agree with the reasoning in *Murphy v. Raoul*, 380 F. Supp. 3d, 731, 765 (Northern District of Illinois 2019), that Plaintiffs have at this stage alleged facts sufficient to plausibly plead deliberate indifference. Plaintiffs having adequately alleged that, quote, the Defendants knew of this problem and the risk that they were inflicting unwarranted punishment, unquote, that, quote, they failed to act or took ineffectual action, unquote, to address that problem and, quote, their response caused the unjustified detention, unquote, because, quote, they chose to confine these individuals past their release date, unquote, which plausibly, quote, amounts to reckless disregard of constitutional rights, unquote. *Murphy* at 765. I cannot conclude on the basis of the FAC that the Defendants were not deliberately indifferent.

While the thrust of Defendants' argument is that Plaintiffs' prolonged incarceration was, quote, penologically justified to protect the safety and continuity of care of

Plaintiffs as well as the safety of the community, unquote, that's from Defendants' brief at 21 to 22, they offer no Second Circuit authority for why I should consider these supposed justifications in my analysis in the context of a claim of over-incarceration. While the existence or not of a penological justification makes sense in the context of determining whether the imposition of a sentence or the conditions of confinement amount to cruel and unusual punishment, it does not make sense in the context of a claim that the sentence and, therefore, any legitimate penological purpose has ended, but the Plaintiff was not released. The most recent Circuit case on prolonged incarceration, *Francis*, makes no mention of penological justification, and district courts in the circuit have found the concepts inapplicable to a claim that a prisoner's incarceration exceeded what was justified by his sentence. See *Francis*, 2018 Westlaw 1384499, at page 10 (Northern District March 16, 2018), reversed and remanded on other grounds, 942, F.3d 126; *Brunson v. Duffy*, 14 F. Supp. 3d 287, 292 (Southern District 2014). See also *Campbell v. Peters* 256 F.3d, 695, 700 (Seventh Circuit 2001), which held that if a prisoner serves the correct amount of time, he has not been confined without penological justification; and if he serves too much time, he has been confined without penological justification. Even *Sample v. Diecks*, 885 F.2d 1099 at 1108, (Third Circuit 1989), which

Defendants rely in their reply at page 10, does not support application of the concept of penological justification in the context of prolonged incarceration. It acknowledged that there is no penological justification for keeping a prisoner beyond his date of release because, quote, any deterrent and retributive purposes served by his time in jail were fulfilled as of that date, unquote. That's Sample at 1108. While it goes on to suggest that there might arguably be a penological justification where a prisoner is erroneously kept too long due to miscalculation of his sentence, in the sense that having an error-free prison system would be prohibitively costly or even impossible. See Sample at 1108 to 09. It never began to suggest that knowingly and intentionally keeping a prisoner beyond his term could be penologically justified. I find that where prison officials know that a prisoner has reached the end of, quote, the term established by the state, unquote, Sample at 1108, any penological justification the state might have for keeping him incarcerated would expire at the time. In other words, there is penological justification for holding a prisoner to the date at which he is entitled to be released, but not beyond it.

I'm realizing I was about to discuss penological justification for the general class, but the general class does not bring the Eighth Amendment claim. So I think I can skip over that part.

I also note, however, that I could not find at this stage on the present record that the safety of the prisoner or of the community are in fact the reasons for holding Plaintiffs too long or that these justifications would suffice. It may be that those are the actual reasons or more likely part of the actual reasons, but I cannot so conclude from the FAC which plausibly attributes the challenged actions to the state's failure to provide sufficient community-based housing and supportive services. Factual development and revisiting the issue on summary judgment would be necessary. And I am dubious that the proffered safety rationale would suffice in any event. Potentially dangerous people, and sick people, are released from prison every day. If that were enough to hold someone beyond his sentence, there are many prisoners who would be imprisoned indefinitely at the whim of corrections officials. Further, Defendants' argument amounts to the claim that the state can detain people indefinitely because the state has determined that they need a type of housing that's not available to them. That would seem to create a Catch 22 that would be a large enough loophole to swallow the Eighth Amendment and their liberty.

So the motion to dismiss the Eighth Amendment claim on the prolonged incarceration theory is denied.

The Eighth Amendment also bars punishment of a status or condition and involuntary conduct that is inseparable from that

status or condition. See *Robinson v. California*, 370 U.S. 660 at 666 to 67, which noted that penalizing mental illness is universally thought to be cruel and unusual. See also Justice White's concurring opinion in *Powell v. Texas*, 392 U.S. 514, 551 to 52, addressing involuntary conduct.

Defendants rightly point out that the majority of cases Plaintiffs cite, including *Robinson v. California*, 370 U.S. 660, involve statutes that that impermissibly criminalize status or involuntary conduct related to that status, whether or not the person charged otherwise engaged in substantive criminal conduct. For example, in the Fourth Circuit case cited by Plaintiffs, *Manning v. Caldwell*, 930 F.3d 264 (Fourth Circuit 2019), the Court found that the Plaintiffs stated an Eighth Amendment claim where a Virginia statute made it a criminal offense for, quote, habitual drunkards, unquote, to possess, consume or purchase alcohol. See *Manning* at 284. The Fourth Circuit in that case stressed the narrow impact of its holding, noting that Plaintiffs did not challenge the constitutionality of any restrictions imposed after conviction of a crime, because, unquestionably, courts may restrict an individual's liberty pursuant to a criminal sentence. And in some cases may do so after the formal sentence has concluded. Here, by contrast, the extension of the prison term is not mandated by a statute that explicitly makes status or involuntary conduct a crime. Plaintiffs allege rather that

they are subject to restrictions which unconstitutionally lengthen a prison sentence imposed after conviction and imprisonment for an underlying crime.

Plaintiffs again point to *Murphy v. Raoul*, however, to support their assertion that the conduct alleged here nevertheless impermissibly criminalizes status and involuntary conduct. See 380 F. Supp. 3d at 765. In *Murphy*, the state prison system would not release prisoners who had no address to which to go and would not approve shelters as housing, which kept homeless prisoners incarcerated indefinitely, effectively punishing their status as homeless. The *Murphy* court reasoned that for these Plaintiffs, the failure to secure housing was, quote, not voluntary conduct merely related to or derivative of the status of homelessness, but is entirely involuntary conduct that is inseparable from their status of homelessness, unquote. That's *Murphy* at 765. There the Defendants also maintained that criminalization of status was inapplicable because the state was not charging the Plaintiffs with a crime of being homeless under a statute as the other jurisdictions did in the case law. The *Murphy* court disagreed, calling the effort to distinguish the cases, quote, a distinction without a difference, unquote, because, quote, all the Eighth Amendment calls for is punishment, unquote, not a new charged crime. *Murphy* at 264. I agree.

While I note that this theory likely presents a steeper

climb for the Plaintiffs than the prolonged incarceration line of cases, I believe they have plausibly shown that Defendants have kept them locked up due to their status as seriously mentally ill inmates, coupled with the fact they have no good place to go, similar to *Murphy*. For this reason, Defendants' motion to dismiss the criminalization of status claims is denied.

Finally, turning to Substantive Due Process: Plaintiffs also allege that Defendants' conduct violates -- I'm going to abbreviate it SDP under the Fourteenth Amendment. SDP exists to prevent the government form infringing those immunities, quote, implicit in the concept of ordered liberty, unquote, and, quote, so rooted in the traditions and conscience of our people as to be ranked as fundamental, unquote. *Rochin v. California* 342 U.S. 165, 169, 172; See *U.S. v. McLaurin*, 731 F.3d 258, 261. Further, for strict scrutiny to apply, the challenged conduct must, quote, shock the contemporary conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 847, Note 8. But, quote, if a constitutional claim is covered by a specific constitutional provision, such as the ... Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process, unquote. *Lewis* at 843. See *Graham v. Connor*, 490 U.S. 386, 394. Quote, this is so because ... the guideposts for responsible decision making in the unchartered

area of substantive due process are scarce and open ended, unquote, causing the Supreme Court to, quote, limit the availability of substantive due process claims to those which are not covered under other amendments, unquote. *Holland v. City of New York*, 197 F. Supp. 3d 529, 547 (Southern District 2016). Quote, where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a Plaintiff's claims under that explicit provision and not under the more generalized notion of substantive due process. *Kia P. v. McIntyre*, 235 F.3d, 749, 757 to 58. See *Velez v. Levy*, 401 F.3d, 75, at 94. Where the court said, quote, where a specific constitutional provision prohibits government action, Plaintiffs seeking redress for that prohibited conduct in a Section 1983 suit cannot make reference to the broad notion of substantive due process. And *Doyle v. Santiago*, 2019 Westlaw 5298147, at page 5 (District of Connecticut October 18, 2019) where the Court said, quote, If the plaintiff's confinement ... is conscious-shocking, it would violate the Eighth Amendment. Thus his claim should be considered under the Eighth Amendment, not the Substantive Due Process clause, unquote. Quote, in other words, what would serve to raise Defendants' actions beyond the wrongful to the unconscionable and shocking are facts, which, if proven, would constitute in themselves specific constitutional violations, unquote. *Velez*, 401 F.3d at 94.

Although I note that the allegations in the FAC likely satisfy the standards for SDP, I am foreclosed from analyzing these allegations through SDP because the claims are, quote, subsumed in the more particular allegations, unquote, of the Eighth Amendment claim. *Velez* 94.

So to sum up. Governor Cuomo is dismissed as a Defendant.

Defendants' motion to dismiss on mootness grounds is denied without prejudice to renewal to the extent Plaintiffs claim the conditions into which they were released are not sufficiently integrated.

Defendants' motion to dismiss is granted as to the Substantive Due Process claim and otherwise denied.

The Clerk is to terminate Docket Motion No. 79 and to terminate Governor Cuomo as a party.

I think we have October 2nd as a date for Defendants to either answer the SAC or submit another premotion letter; am I right about that? And remember to say your name before you answer.

MR. HARBEN: I'm sorry. There was some yelling. The electricity just went out in my house.

THE COURT: Am I right that October 2nd is the date for either your answer or premotion letter addressed to the SAC?

(Reporter interruption)

THE COURT: Yes. Mr. Harben, you've got to say --

every time you speak, you've got to say your name, the first word out of your mouth.

MR. HARBEN: I think we'd like to be able to order this decision expedited so we can read it and just parse it out a little bit. It's very long. There has to be -- because there was a part about possibly the additional facts dealing with some of the claims that you addressed today.

So I'm just -- the current deadline is October 2nd. I'm wondering if we can get a little more time to process that so we can -- at least can get -- review this transcript before we finalize anything?

THE COURT: What date do you propose?

MR. HARBEN: Could we get another two weeks beyond that?

THE COURT: Any objection on Plaintiffs' side to October 16?

MS. LANDRISCINA: No objection, your Honor.

THE COURT: All right. So Defendants' answer or pre-motion letter with respect to the Second Amended Complaint will be due October 16. And if it's a premotion letter, I'll set another conference.

In the meantime, sad to say we're losing Judge Smith next Wednesday where she, a little too happily, is going into retirement. No, I shouldn't say that. She's not 100 percent happy about it. In fact, to the point where she volunteered to

stay on a little longer if her replacement isn't cleared in time.

But you will be transitioning to the new magistrate judge and continuing to roll along with paper discovery. So I don't think I need to -- I don't need to get involved with that.

Is there anything else anybody wants to say before we ring off?

MR. HARBEN: I guess on the issue of discovery, with the new claims as we've written in the past about, we haven't even gotten to the point of responding on that yet. That's something we wanted to raise with the new magistrate and potential stay.

THE COURT: Yeah, I mean, when we -- when we met way back when, we agreed, I thought, that we were going to hold off on depositions but proceed on paper discovery. And if there's some reason why that's changed, you can take it up with the magistrate judge.

But let me also -- I know this whole call is public. But so I guess there's no point in going off the record, but this is a good juncture, I think, in which the parties should, again, try to resolve it. You know, the state says that it's -- at least the original claims, the state says it's not doing it anymore. I've just found that the record at this stage is not sufficient for me to conclude that it's not

happening anymore and it won't recur, but that could change sooner rather than later. And the plaintiffs will have achieved an important part of what they've asked for. I recognize that the other part of what they've asked for, which is to be released not into shelters or other undesirable places, but into housing that actually addresses their needs, is sort of now the new part two of the case.

But I think Plaintiffs also have to be realistic about where the money is going to come from to solve these problems. I don't doubt that OMH would be perfectly happy if it had a blank check to create sufficient housing for released prisoners with serious mental illness. But I don't see any likelihood that there's a pot of gold for that in the short term.

So I hope that when you start anew with Magistrate Judge Krause, and even before that, that you'll discuss amongst yourselves resolving at least some of the issues. If Defendants can demonstrate to Plaintiffs that since this briefing has occurred, things have changed in a way that would satisfy them, maybe at least we can narrow the issues, if not resolve the whole thing.

So I hope you'll continue to talk. I do think there's a vibe here that the Defendants were trying to pick off the named Plaintiffs. But at the same time, they did stop -- or they say they've stopped -- the challenged practice and

that's really the gold ring here.

So I hope Plaintiffs, you know, don't lose the forest for the trees. And if persuaded that that change has really been made, they will have accomplished what they set out to accomplish, at least, with the first two complaints and should be pleased with that.

So I hope both sides will continue to talk and that when you resume with the new magistrate judge, maybe you can get somewhere. And I will await October 16, and see if we get an answer or a premotion letter.

Anything else we should talk about? All right. I hope everybody is healthy and remains so. Have a good weekend, all. Take care.

(Proceedings concluded)